

## BEFORE THE FEDERAL ELECTION COMMISSION

**SENSITIVE**

In the Matter of )

MUR 5430

Buchanan for President, Inc. and Angela M. "Bay"  
Buchanan, in her official capacity as treasurer )

## GENERAL COUNSEL'S REPORT #3

**I. ACTIONS RECOMMENDED**

(1) Find probable cause to believe that Buchanan for President, Inc. and Angela M. "Bay" Buchanan, in her official capacity as treasurer, violated 2 U.S.C. §§ 432(h), 434(b), and 441a(f).

(2) Find probable cause to believe that Buchanan for President, Inc. and Angela M. "Bay" Buchanan, in her official capacity as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(h), 434(b), and 441a(f).

**II. BACKGROUND**

In March 2001, Angela M. "Bay" Buchanan established the "Buchanan Fund" to pay campaign-related expenses for Buchanan for President, Inc. ("BFP"), which was the principal campaign committee for Patrick J. Buchanan's campaign for the 1996 Republican nomination for President. In fundraising solicitations, Ms. Buchanan stated the Buchanan Fund was established "with the advice of counsel" and "will be used to pay campaign related expenses, which do not require 'federal' dollars for payment." In fact, the majority of disbursements from the Buchanan Fund paid debts and winding down costs of Mr. Buchanan's 1996 campaign. Ms. Buchanan, who was BFP's treasurer, failed to designate a depository that maintained the Buchanan Fund, failed to report the Buchanan Fund activity, and accepted

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1 contributions in excess of limits established by the Federal Election Campaign Act of 1971, as  
2 amended (the "Act").<sup>1</sup>

3 As discussed in the General Counsel's Brief, incorporated herein by reference, the  
4 Commission specifically admonished Ms. Buchanan in a previous matter for violations of the  
5 Act that stemmed from very similar activity. *See* General Counsel's Brief ("GC Brief") at 7-8.  
6 In MUR 4918, BFP asked recipients of refunded excessive contributions to endorse their refund  
7 checks to a "compliance" fund established to cover winding down costs of Mr. Buchanan's  
8 1992 presidential campaign. The Commission concluded that the compliance fund's receipts  
9 (which were reported) were "contributions" subject to the Act's limitations, and that as a result  
10 the 1992 compliance fund had accepted excessive contributions. The Commission warned that  
11 Ms. Buchanan "should take steps to ensure that this activity does not occur in the future." *See*  
12 Letter from Scott E. Thomas to Angela M. "Bay" Buchanan in MUR 4918 (Aug. 30, 1999).  
13 But it did. In this matter, Mr. Buchanan's 2000 presidential campaign asked recipients of  
14 refunded excessive contributions to endorse their refund checks to "The Buchanan Fund,"  
15 which Ms. Buchanan had established to cover BFP's winding down costs. Like the 1992  
16 compliance fund, BFP accepted excessive contributions as a result. Moreover, in this instance  
17 the violations went a step further because, as noted, Ms. Buchanan failed to disclose any  
18 "Buchanan Fund" activity to the Commission.

19 BFP does not dispute the facts that give rise to violations of sections 432(h), 434(b), and  
20 441a(f) of the Act. Instead, BFP's Brief is devoted almost entirely to challenging evidence that  
21 the alleged violations were knowing and willful. In this regard, Respondents continue to claim

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<sup>1</sup> All of the facts recounted herein occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act are to the Act as it read prior to the effective date of BCRA and all citations to the Commission's regulations are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

1 that Ms. Buchanan relied on the advice of counsel, though she cannot identify the attorney who  
2 provided her with the advice, or tell us precisely what the attorney said, or explain why she  
3 interpreted the advice as approval for the conduct at issue here. This empty assertion falls far  
4 short of making out an advice of counsel defense. Additionally, Respondents concede that  
5 Ms. Buchanan received the admonishment letter from the Commission, but attempt to minimize  
6 its significance because Ms. Buchanan purportedly did not "examine it closely." Reply Brief of  
7 Buchanan for President, Inc. ("BFP Brief") at 10. If, in fact, Ms. Buchanan elected not to pay  
8 attention to a letter from the Commission admonishing her about conduct that could be illegal,  
9 this strengthens the knowing and willful case; it does not provide a defense to it.

10 Accordingly, this Office recommends that that the Commission find probable cause to  
11 believe that BFP knowingly and willfully violated 2 U.S.C. §§ 432(h), 434(b), and 441a(f).

12 **III. ANALYSIS**

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14 **A. The Buchanan Fund Was Subject to the Act's Reporting Requirements and**  
15 **Contribution Limitations**

16  
17 The evidence shows that the Buchanan Fund was an account of BFP for which BFP  
18 should have designated a depository and reported its activities. See GC Brief at 2-5. It is  
19 undisputed that Ms. Buchanan signed and sent a solicitation letter that referenced  
20 Mr. Buchanan's 1996 presidential campaign and stated that the Buchanan Fund would "be used  
21 to pay campaign related expenses, which do not require 'federal' dollars for payment."  
22 Deposition of Angela M. "Bay" Buchanan ("Buchanan Dep.") Ex. 4 ("the February 2001  
23 Solicitation Letter"). It is also undisputed that receipts in this account were used to pay debts  
24 and winding down costs of the Candidate's 1996 campaign, including payments to the U.S.  
25 Treasury arising out of BFP's liability for stale-dated checks, payments for BFP's legal  
26 services, and payments to a moving company.

1 While conceding the underlying facts, BFP asserts that “the establishment of, and  
2 deposit of excess contribution[s] into, the Buchanan Fund was not illegal” because no legal  
3 consequences flowed from the Buchanan Fund until that account disbursed money. BFP Brief  
4 at 6. In other words, its treasurer “had no obligation to identify the account, or report receipt[s]  
5 and expenditures to the Federal Election Commission, *unless and until* she intended to make  
6 ‘contributions’ and ‘expenditures’ under the Act with the monies collected.” *Id.* (emphasis in  
7 original). As a result, BFP could purportedly solicit unlimited funds to be deposited into and  
8 disbursed from the Buchanan Fund—and determine at a later date the legal status of that  
9 account. BFP concludes that the only “expenditures” that made the Buchanan Fund subject to  
10 the Act (“if at all”) were BFP’s payment of legal expenses and its payment in connection with  
11 certain “stale-dated checks.”<sup>2</sup> *Id.* at 7.

12 Contrary to BFP’s assertions, the requirement to designate and report under the Act  
13 commenced at the time that the Buchanan Fund began to receive money. *See* 2 U.S.C.  
14 § 434(b); 11 C.F.R. § 104.3(a); 2 U.S.C. §§ 441a(f) and 441a(a)(1)(A); *FEC v. Ted Haley*  
15 *Cong. Comm.*, 852 F.2d 1111, 1115 (9<sup>th</sup> Cir. 1988) (post-election donations to retire campaign  
16 debt are for the purpose of influencing and are in connection with that election). A publicly  
17 funded committee may not create accounts for “campaign related expenses” that operate  
18 outside of this regulatory regime, absent narrow exceptions. *See* GC Brief at 4 n. 7 (addressing  
19 Buchanan Fund’s failure to qualify for exceptions).<sup>3</sup> The February 2001 Solicitation Letter  
20 specifically refers to the “1996 campaign” (as well as the “2000 campaign”) in its request for

<sup>2</sup> BFP owed money to the United States Treasury in connection with MUR 5192. The conciliation agreement in MUR 5192 obligated BFP to pay the Treasury as a result of the existence of “stale-dated committee checks.” *See* 11 C.F.R. § 9038.6.

<sup>3</sup> BFP has never identified a narrow exception that could apply to the establishment and operation of the Buchanan Fund.

1 funds to be used to pay "campaign related expenses, which do not require 'federal' dollars for  
2 payment." Buchanan Dep. at Ex. 4. Over the course of 2001, a substantial majority of money  
3 disbursed from the Buchanan Fund related to BFP (*i.e.*, the 1996 campaign).<sup>4</sup>

4 Consequently, there is probable cause to believe that Buchanan for President, Inc. and  
5 Angela M. "Bay" Buchanan, in her official capacity as treasurer, violated 2 U.S.C. §§ 432(h),  
6 434(b) and 441a(f). As explained below, in section III.B, there is probable cause to believe that  
7 Respondents knowingly and willfully violated the Act.<sup>5</sup>

8 **B. There is Probable Cause to Believe that BFP Knowingly and Willfully Violated**  
9 **the Act**

10  
11 As set forth in the GC Brief, BFP knowingly and willfully violated the Act in its  
12 establishment and operation of the Buchanan Fund. *See* GC Brief at 6-8. The committee failed  
13 to comply with the Act's disclosure requirements and its contribution limitations, even for  
14 admitted "campaign related expenses." *See Id.* at 8.<sup>6</sup> Moreover, the Committee's treasurer  
15 (Ms. Buchanan) was aware of the mandate to disclose financial transactions of political  
16 committees and to abide by the Act's contribution limitations, having done so for a number of

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4 Contrary to BFP's claim, the relevant disbursements are not limited to four payments (the payments, in three installments, to the Treasury in connection with the stale-dated check issue, and the payment in settlement of certain of BFP's legal fees). *See* BFP Brief at 2-3, 11. The GC Brief stated as follows: "Among its disbursements during 2001, the Buchanan Fund paid \$27,431 to the United States Treasury on behalf of BFP. In addition, the Buchanan Fund disbursed \$3,000 to a law firm in settlement of invoices for legal services performed for BFP." GC Brief at 3 (footnote detailing Treasury payment omitted). The GC Brief cited these disbursements as *examples* of payments relating to the 1996 campaign, but in no way limited its contentions to those payments.

5 The GC Brief also addresses BFP's receipt of excessive contributions wholly unrelated to the Buchanan Fund. GC Brief at 3, 6 (\$14,483 to BFP's designated accounts). We do not claim that these violations were knowing and willful and BFP makes no argument regarding this amount of excessive contributions.

6 BFP argues that the reference in the February 2001 Solicitation Letter to "campaign related expenses" was for those expenses that did "not require 'federal dollars' for payment" and that this reference was meant to assure contributors that the funds would not be used for the candidate's "personal expenses." BFP Brief at 8. However, BFP provides no explanation of what kind of "campaign related expenses" would not require federal dollars.

1 previous committees. *See Id.* BFP does not dispute that Ms. Buchanan was an experienced  
2 treasurer, who was knowledgeable about the Act's disclosure requirements.<sup>7</sup>

3 Attempting to dispute that the violations were knowing and willful, BFP relies on an  
4 affidavit signed by Ms. Buchanan in which she states that she "recalls[s] talking to counsel  
5 about my intention to ask contributors who were to receive refunds to reallocate those funds  
6 either to Buchanan '96 or a separate fund that would not make 'hard money' expenditures, and  
7 that counsel advised me that such actions were legal and would not violate the federal election  
8 laws." BFP Brief, App A at 3. Ms. Buchanan does not recall the name of the attorney with  
9 whom she consulted, but asserts that it would have been one of a number of attorneys with  
10 whom she regularly conducted business. BFP Brief at 5. Respondents also rely on two letters  
11 from attorneys purporting to demonstrate that Ms. Buchanan received advice of counsel in  
12 establishing the Buchanan Fund. BFP Brief at 4-8.<sup>8</sup>

13 In one of the two letters, Alan P. Dye, whose firm "has provided legal advice to  
14 Ms. Buchanan" from the early 1990's, states, "Ms. Buchanan believes that she talked to me or  
15 another lawyer regarding the establishment of a non-political fund. I do not remember the  
16 conversation specifically, but I do know the advice I would have given if I were asked." BFP  
17 Brief, App. C. Mr. Dye notes that "[i]f he were asked," then he would have answered that she

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7 Indeed, BFP argues that its treasurer's knowledge and experience were sufficiently sophisticated that had she wanted to, the treasurer could have hidden funds more effectively than through the use of the Buchanan Fund. *Id.* at 10-11. BFP suggests that Ms. Buchanan assumed the Buchanan Fund activity would come to light because it received funds from contribution refund recipients of the 2000 committee—a committee "that was identified and reported expenditures to the FEC." *Id.* Thus, her "actions are inconsistent with an attempt to 'disguise the source of the funds' coming to the Buchanan Fund," *id.* at 11, and her conduct, BFP contends, was "inconsistent with a 'motivation to evade lawful obligations.'" *Id.* (citing *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990)).

1 could have requested that individuals contribute "to a separate organization, which would not  
2 engage in activities regulated by the Federal Election Campaign Act." *Id.*

3 John J. Duffy, the attorney currently representing BFP in the present matter, similarly  
4 states:

5 I have no letters, emails, or other documents providing advice to [Buchanan  
6 Reform, Inc. (the Buchanan 2000 primary committee)] or Ms. Buchanan  
7 concerning the reallocation by [Buchanan Reform, Inc.] to [BFP] or Buchanan  
8 Fund. In addition, I have no recollection of discussing the reallocation of these  
9 contributions with Ms. Buchanan or other representatives of [Buchanan Reform,  
10 Inc.].

11  
12 BFP Brief, App. B. at 1. Nonetheless, Mr. Duffy states that "had [he] been asked," he would  
13 have advised that contributors could send money to an entity that could "lawfully receive the  
14 monies." *Id.*

15 A party asserting reliance on advice of counsel must provide some indication that he or  
16 she disclosed the relevant facts to counsel in requesting legal advice regarding the  
17 contemplated action, that he or she received advice that the action would be legal, and that he  
18 or she relied on it. *See, e.g., SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 10 & n. 7 (D.D.C.  
19 1998) (in securities fraud action, where defendants refused to divulge either the  
20 communications with or the identity of their attorney, court could not evaluate reliance on  
21 advice of counsel); *SEC v. Scott*, 565 F. Supp. 1513, 1535 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 118  
22 (2d Cir. 1984) (defendant could not establish reliance on advice of counsel where attorney did  
23 not recall being asked about relevant stock purchases and defendant failed to offer testimony on  
24 that issue); *cf. Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1259-  
25 60 (Fed. Cir. 1997) (court found willful patent infringement, despite defendant's asserted  
26 reliance on opinions from counsel, where such opinions did not address certain relevant designs  
27 and were "superficial and conclusory in nature").

1 Here, the assertion that Ms. Buchanan acted on non-specific advice potentially rendered  
2 by one of two (or possibly other) attorneys does not pass the threshold to put the advice of  
3 counsel defense at issue. Moreover, neither of the two attorneys submitting letters on her  
4 behalf remembers even receiving a request from Ms. Buchanan or advising her about the  
5 legality of the Buchanan Fund, and neither purports to have rendered advice that it would be  
6 lawful to establish a separate committee to pay debts incurred by BFP. Indeed, given the  
7 manifest illegality of such an arrangement, it is difficult to believe that an attorney would have  
8 provided her with such advice.

9 The Commission's previous admonishment to Ms. Buchanan in an earlier matter (MUR  
10 4918) for similar conduct further demonstrates that BFP, through Ms. Buchanan, knowingly  
11 and willfully violated the Act. *See* GC Brief at 7-8. BFP attempts to diminish the significance  
12 of that admonishment, arguing that Ms. Buchanan did not closely review the letter addressed to  
13 her. BFP Brief at 9-10. Specifically, BFP claims that another individual, Scott Mackenzie,  
14 directed the day-to-day operations of the 1992 and 1996 Buchanan presidential committees  
15 and, for most of the relevant period, the activities of the "compliance fund," the entity at issue  
16 in MUR 4918. *Id.* According to Respondents, Ms. Buchanan's "attention" was not drawn to  
17 MUR 4918 because it involved the 1992 campaign, "focused on activities conducted by  
18 Mr. Mackenzie, and called for no action on her part." *Id.* at 9. Ms. Buchanan "remembers  
19 taking from the [admonishment] letter and the attachments, and a brief discussion with her  
20 counsel" only that a presidential compliance fund could not be established for a presidential  
21 primary committee. *Id.* at 10.

22 It may well be that Ms. Buchanan did not give the admonishment letter close attention.  
23 But the fact remains that she disregarded advice, in writing, from the Commission involving the



1 very same type of violative conduct that she and BFP are charged with here. Such “reckless  
2 disregard” of the consequences of her actions is a sufficient basis for finding that the violations  
3 were knowing and willful. *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101-02 (D.C. Cir. 1980) (noting  
4 that a “willful” violation includes “such reckless disregard of the consequences as to be  
5 equivalent to a knowing, conscious, and deliberate flaunting of the Act,” but concluding on the  
6 facts before it that this standard was not met) (cited in *National Right to Work Comm. v. FEC*,  
7 716 F.2d 1401, 1403 (D.C. Cir. 1983)). Indeed, the Commission and courts have considered as  
8 evidence of willfulness a party’s disregard for a prior agency reprimand or admonishment. *See*  
9 MUR 2613 (Commission found “knowing and willful” record keeping violations where the  
10 Audit staff had discussed the identical record keeping violations with the same committee  
11 during the exit conference for the audit of the previous election cycle); *Grubb v. FDIC*, 34 F.3d  
12 956, 963 (10<sup>th</sup> Cir. 1994) (under FDIC standard of “willful disregard,” agency’s order removing  
13 petitioner from position as bank director supported by substantial evidence where “bank  
14 examiners informed Petitioner during this period that the extensions of credit [he had received  
15 from the bank] exceeded the Bank’s lending limits in violation of banking laws and regulations,  
16 and admonished Petitioner to cease and correct the violations. Despite these admonishments,  
17 Petitioner continued to receive extensions of credit from the Bank” that exposed bank to  
18 abnormal risk of loss); *Goodman v. Benson*, 286 F.2d 896 (7<sup>th</sup> Cir. 1961) (held conduct willful  
19 under the APA where 18 months after being admonished (without sanctions) by Commodity  
20 Exchange Authority, trader engaged in similar violation trading same type of futures contracts:  
21 “Apparently the rebuke he received in 1956 for exceeding 500,000 bushels in rye made very  
22 little impression upon him.”); *cf. United States v. Logan*, 250 F.3d 350, 368-69 (6<sup>th</sup> Cir. 2001)

1 (prior agency letter of reprimand admissible to show "knowledge, motive, and intent" in bank  
2 fraud action).

3 Based on the foregoing discussion, this Office recommends that the Commission find  
4 probable cause to believe that Buchanan for President, Inc. and Angela M. "Bay" Buchanan, in  
5 her official capacity as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432( h), 434(b),  
6 and 441a(f) with respect to the operation of the Buchanan Fund.

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V. RECOMMENDATIONS

1. Find probable cause to believe that Buchanan for President, Inc. and Angela M. "Bay" Buchanan, in her official capacity as treasurer, violated 2 U.S.C. §§ 432(h), 434(b), and 441a(f).
2. Find probable cause to believe that Buchanan for President, Inc. and Angela M. "Bay" Buchanan, in her official capacity as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(h), 434(b), and 441a(f).
- 3.

11/29/05  
Date

Lawrence H. Norton  
General Counsel

Rhonda J. Vosdingh by LLC  
Rhonda J. Vosdingh  
Associate General Counsel for Enforcement

Jonathan A. Bernstein  
Jonathan A. Bernstein  
Assistant General Counsel

Mark A. Goodin  
Mark A. Goodin  
Attorney

Attachment: